No. 95-31

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1995

SHANNON RICHEY FAULKNER,
individually and on behalf of all others similarly situated,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent,

—and—

JAMES E. JONES, JR., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF SHANNON RICHEY FAULKNER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

CASES	Page(s)
Brown v. Board of Educ., 347 U.S. 483 (1954)	2, 6, 7
Estelle v. Gamble, 429 U.S. 97 (1976)	5
Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995)	3, 4, 6, 8
J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994)	1, 7, 8
Land v. Dollar, 330 U.S. 731 (1947)	5
Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)	7, 8
Sweatt v. Painter, 339 U.S. 629 (1950)	2, 7
United States v. Commonwealth of Virginia, 44 F.3d 1229 (4th Cir. 1995)	1, 2

Neither South Carolina or The Citadel respondents ("South Carolina respondents") nor the United States offer any reason that eliminates the need for this Court to review and reverse the decision below.

1. Neither the United States nor the South Carolina respondents address the specific grounds for certiorari presented by Ms. Faulkner. Instead, both erroneously assert that Ms. Faulkner's petition "seeks review of the same remedial issue" raised by the United States in its petition for writ of certiorari in *United States v. Commonwealth of Virginia*, 44 F.3d 1229 (4th Cir. 1995) ("*VMI II*"). Citadel Brief In Opposition at 6 ("Citadel Opposition"). While the United States admits that the decision below "presents an issue of importance calling for this Court's review," Memorandum for the United States In Opposition at 6 ("U.S. Memorandum"), it argues that any decision in *VMI II* will resolve the issue presented in *Faulkner*. The South Carolina respondents merely rely upon the Brief in Opposition to the Petition for Certiorari in *VMI*, which does not address the arguments raised by Ms. Faulkner. Seeking to conflate the two cases, respondents ignore fundamental differences between the legal arguments presented in each petition and the different records in each case.

a. Respondents do not dispute that Shannon Faulkner's petition raises the exceptionally important issue explicitly reserved by this Court most recently in *J.E.B. v. Alabama ex rel. T.B.*, 114 U.S. 1419 (1993), as to the proper level of scrutiny that applies to a state's remedial choice to preserve an unconstitutional gender classification. Neither The Citadel respondents nor the United States even addressed this issue. Whether a state's decision to perpetuate the invidious exclusion of women from a unique military-style college by relegating women to a separate and unequal program is inherently suspect, raises an exceedingly important issue that warrants immediate review by this Court.

b. The legal arguments presented by Ms. Faulkner and the United States differ in nature and scope. Unlike the United States, Ms. Faulkner broadly attacks the decision below on strictly legal grounds. Ms. Faulkner argues that a state's remedial decision to perpetuate its unconstitutional exclusion of women is inherently suspect, and subject to strict scrutiny by the court.[1] The United States does not raise this issue. Ms. Faulkner also argues that, under *Brown v. Board of Educ.*, 347 U.S. 483, 488 (1954), women are entitled to educational opportunities "equal" to those offered to men by a state, not "substantively comparable" as the decision below authorizes. Unlike the United States, Ms. Faulkner argues that, under *Brown* and *Sweatt v. Painter*, 339 U.S. 629 (1950), the only appropriate remedy "[o]nce a federal court finds that a state has unlawfully excluded a group of students from a public educational program . . . is for the state to admit the excluded individuals and to remedy the prior discrimination." Faulkner Petition at 19. Finally, Ms. Faulkner does not concede that the question presented in *Faulkner* or *VMI* relates to the maintenance of "single-sex education." The exclusion of women from the Citadel denies women equal access to power, prestige, and career opportunities—not to "single-sex education."

In contrast, the question presented by the United States is narrowly tailored and primarily fact-bound. The United States does not categorically challenge the holding of *VMI II* that permits a state to remedy the unconstitutional exclusion of women from a unique state college by creating a separate and unequal program for women. The United States instead concedes that "assum[ing] that state maintenance of separate single-sex schools for men and women . . . [a state] must provide educational programs that are genuinely equal or the State must justify any inequality under a standard of

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[1] Neither VMI nor The Citadel contends that their males-only admission policy meets the test of strict scrutiny.

heightened constitutional scrutiny." United States' Petition at 16. ("U.S. Petition") The United States does not argue that a state may never provide unequal educational programs, only that "*in the circumstances of this case*, the only remedy consistent with equal protection principles is to admit women to VMI." U.S. Petition at 26 (emphasis added). In its brief in opposition, the United States likewise focuses solely on the facts of this case, arguing that under the circumstances of *Faulkner*, a separate program for women cannot remedy the violation of equal protection.

By narrowly tailoring their argument to the facts and circumstances of *VMI*, the United States makes an essentially fact-bound challenge that fails to offer any standard for this Court as to when separate and manifestly unequal programs may be appropriate. Ms. Faulkner's petition offers this Court the opportunity to consider highly important, and unresolved, issues as to the appropriate level of scrutiny applicable to gender classifications, and a state's obligation to provide all of its citizens with equal educational opportunities. It is the more appropriate vehicle for review by this Court.

c. Respondents attempt to gloss over the obvious factual differences between the record in *Faulkner* and in *VMI*. In opposing Ms. Faulkner's petition, the United States argues that the differences in the factual records of the cases are not relevant "because the district court in this case provisionally accepted the findings in *VMI* on that issue." U.S. Memorandum at 7-8 n.5. That misses the point. The rule of law adopted by the Fourth Circuit in *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) ("*Faulkner II*"), purports to exclude women from The Citadel based upon factual findings made in *VMI* about the alleged value of single-sex education and the effect of coeducation on VMI, which the United States did not appeal. The reach of its holding is broad indeed, and consideration of its effect on different factual situations, such as that presented in *Faulkner*, is essential to fully evaluate the Fourth Circuit's holding.

2. The United States suggests that this petition "would appear to be premature" because the district court has not had an opportunity to make factual findings on the constitutionality of South Carolina's remedial proposal for a non-military program for women at Converse College. U.S. Memorandum at 7. The United States does not dispute that the legal principles challenged by Ms. Faulkner in her petition will, absent review by this Court, govern the remedial proceedings below. U.S. Memorandum at 4, 6-7.[2] Nor does the United States deny that certiorari is appropriate where, as here, the court of appeals has adopted an unconstitutional standard of law that will govern future proceedings in an action. *See* Faulkner Petition at 9-10. It nevertheless suggests that (1) the courts below might find that the Converse Plan fails to meet the "special equal protection" test adopted in the decision below, and (2) this Court "will have the opportunity to review and decide the central issues in [*Faulkner II*]" because the United States' petition in *VMI* raises "the same issues." *Id.* Rather than militate against review by this Court, these arguments demonstrate the need for immediate review by this Court.

a. The United States concedes that the constitutionality of the Converse proposal, which South Carolina asserts is "modeled closely on the Mary Baldwin Plan," (Citadel's Application For Stay to the U.S. Supreme Court at 7) will be analyzed under the "toothless 'substantive comparability' requirement" set forth in the decision below. United States Reply In *VMI* at 9 ("U.S. Reply") The United States admits that the "special equal protection test" adopted below "requires no heightened justification," (U.S. Petition at 16) and "compounds the original constitutional violation by invoking harmful gender stereotypes." *Id.* at 15.

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[2] Contrary to the United States suggestion, Ms. Faulkner's claim is not moot. She withdrew from the Corps of Cadets under great mental stress, and will consider applying for re-admission if the courts permit other women to attend. In addition, Nancy Mellette filed a motion to intervene in this petition on September 11, 1995.

Absent review by this Court, the courts below will review the Converse proposal under the blatantly unconstitutional legal principles announced in the decision below: (1) that a state may remedy an unconstitutional gender classification by creating a separate, and intentionally unequal, program for women, based upon differences in the "educational needs of most men and women"; (2) that a state need not offer women "identical" educational programs, only programs for women which are "substantially comparable" to those provided to men; and (3) that such a remedy satisfies the requirements of equal protection as long as it meets the "special equal protection test" adopted by the Fourth Circuit in the decision below. In similar situations in the past, this court has exercised its jurisdiction to determine an important issue of law which is fundamental to the further conduct of the case. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976); *Land v. Dollar*, 330 U.S. 731 (1947). That course makes special sense here given the pendency of a petition for certiorari in the *VMI* case. Faulkner Petition at 12.

To require the parties to litigate the Converse proposal under an unconstitutional standard is not just an exercise in futility, it is fundamentally unjust. Had the court of appeals remanded a race discrimination case for consideration under the rational basis test, it is doubtful that the United States would argue that review by this Court would be premature.

To avoid unnecessary delay and duplication of judicial resources in this case, this Court should consider all of the issues raised in both cases at once, as it did when considering similar issues of state-sponsored education in *Brown*. Ms. Faulkner has a right to seek immediate review of the manifestly unconstitutional test adopted by the Fourth Circuit, which otherwise will govern the remedial proceedings below. Absent review by this Court, the record and review of the Converse proposal will be infected, perhaps irremediably, by the mandate of the decision below.

b. No further factual findings by the district court are required in *Faulkner* to reverse the decision below, which fundamentally conflicts with well-established principles of equal protection and gender discrimination announced by this Court. The issue presented in Ms. Faulkner's petition, unlike the United States in *VMI*, does not turn on the factual findings of the courts below as to the adequacy of a "separate and unequal" program for women. Ms. Faulkner challenges the legal standard adopted by the Fourth Circuit in *Faulkner II* which authorizes "separate and unequal" education for women, and which modifies the well-established equal protection analysis employed by this Court to evaluate gender classifications. These are questions of law that require no further factual findings by the courts below.

The United States, in fact, concedes that no further factual findings are necessary to resolve the question presented. In its reply in support of its petition in *VMI*, the United States argues that the adverse factual findings in *VMI* "presents no impediment to this Court's review of the question presented by [The United States]" because "the court of appeals' decision approving the remedy in [*VMI*] is squarely in conflict with this Court's equal protection cases even assuming the complete correctness of the district court's factual findings." U.S. Reply at 3. If the adverse factual findings in *VMI* are irrelevant to the question presented in *VMI*, they are equally irrelevant to the question presented by Ms. Faulkner in her petition.

c. As discussed above, Ms. Faulkner's petition raises substantially different issues than the United States' petition in *VMI*. *See infra at 2-4*. Because the United States' petition is primarily fact-bound and limited to "the circumstances of [*VMI*]," a decision in that case might not necessarily dispose of the remedial issues raised in *Faulkner*. Further, there is absolutely no guarantee that this Court will grant the United States' petition for certiorari in *VMI*, or that it will render a decision by next spring, if it does grant the petition.

3. In Virginia's brief in opposition to certiorari in *VMI*, Virginia erroneously asserts that (1) *Sweatt v. Painter* applies only to racial classifications, not to gender classifications, and (2) the United States cannot rely on *Sweatt* because it concedes that a state may justify any inequality in single-sex programs under heightened scrutiny. Brief for Virginia in Opposition at 20-21. ("Virginia Opposition"). *Sweatt* was decided prior to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), before racial classifications were inherently suspect. It did not turn on the nature of the classification or level of scrutiny, but upon the nature of the right to equal protection. Contrary to South Carolina's suggestion, *Sweatt* was decided at a time when the law reflected a belief that separation of the races *was* beneficial and constitutional.

Unlike the United States, Shannon Faulkner does not admit that a state may remedy the exclusion of women from a unique public college, which the federal courts have found is unconstitutional, by creating a separate and intentionally unequal program for women. Women are entitled to no less protection than that afforded racial minorities under the discredited doctrine permitting "separate but equal" facilities.

4. The South Carolina respondents argue that the decision below does not conflict with *J.E.B.* or *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), because the district court in *VMI* found as a fact that there are "psychological and sociological differences" between men and women that are "real differences, not stereotypes." Virginia Opposition at 22. South Carolina fundamentally misapprehends the meaning of "stereotype" and "overly broad generalizations" prohibited by this Court, *inter alia*, in *Hogan* and *J.E.B.*

The South Carolina respondents erroneously assert that the decision below stating that "most women" are not suited for this type of education is not a stereotype, even though the decision below states that "some women" could perform and succeed at The Citadel. As this Court held in *J.E.B.*, sex cannot be a proxy for individual characteristics. *J.E.B.*, 114 S. Ct.

at 1427. In this case, the decision below improperly attributes to all women the "educational needs" of "most" women. Although The Citadel and South Carolina conceded at trial that women can meet the requirements of the Corps of Cadets, the Fourth Circuit nevertheless refused to require the admission of women based upon "established differences in the educational needs of the two genders." *Faulkner II*, 51 F.3d at 443. This is precisely the stereotypical thinking and overly broad generalization rejected outright by this Court in *J.E.B.*, *Hogan*, and a host of other decisions prohibiting classifications based upon gender.

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For all of the reasons stated in the petition, and all of the reasons stated herein, the petition for a writ certiorari should be granted.

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